Supreme Court, U.S.
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89-1403

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NO. _____

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THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARGARET PORTZ VALE,
APPLICANT

VS.

JAMES COOKE, VERNON MCKENZIE, RICHARD STEWART, AND LANNY RYAN,
RESPONDENTS

****

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI, BRIEF,
AND APPENDIX

Submitted on January 18, 1990
by Marceline Lasater
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Counsel of Record for
Petitioner, Margaret Portz Vale

QUESTIONS PRESENTED FOR REVIEW

1. As to Defendant Cooke, where summary judgment evidence indicated (1) that he violated clearly established constitutional law and departmental procedures aimed at protecting the innocent from criminal proceedings and (2) that he knew that his unreliable information would be used to prosecute the person he reported as committing a criminal offense, is his conduct "mere negligence" and not actionable under Section 1983?

2. As to Defendant McKenzie, where Plaintiff plead and the evidence presented to the Court indicated (1) that McKenzie knowingly violated clearly established constitutional law aimed at protecting the innocent from criminal proceedings and (2) that he knew that the information he presented to the Grand Jury regarding the identity of the

suspect was unreliable, was charged with knowledge that Portz was the wrong person and had access to conclusive evidence that Portz was the wrong person, is his conduct "mere negligence" and not actionable under Section 1983?

3. As to Defendant Ryan, where summary judgment evidence indicated (1) that he violated clearly established constitutional law and (2) that, after receiving a capias to execute, he supplied personal information (address and date of birth) to the description of the arrestee on the capias, which information had not been reviewed by any neutral magistrate, at a time that he had knowledge, possession of and access to information indicating that his information did not pertain to the intended arrestee, is his conduct "mere negligence" and not actionable under Section 1983?

4. As to Defendant Stewart, where summary judgment evidence indicated (1) that he violated clearly established constitutional law and departmental procedures aimed at protecting the innocent from criminal proceedings and (2) that he knew that information regarding the identification of Margaret Portz was unreliable and would be used to prosecute her and would be permanently retained in departmental records, is his conduct "mere negligence" and not actionable under Section 1983?

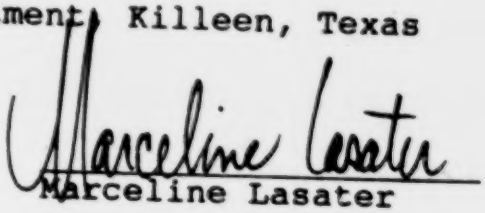
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons either have or claim an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

1. Margaret Portz Vale, Petitioner
2. Eddie Vale, Petitioner's husband
3. Marceline Lasater, Petitioner's counsel
4. Texas Department of Public Safety
5. James Cooke, formerly officer of Texas Department of Public Safety and now believed to be with the Bureau of Alcohol and Firearms for the State of Arizona
6. Richard Stewart, officer of Texas Department of Public Safety

7. Vernon McKenzie, officer with the Temple Police Department, Temple, Texas

8. Lanny Ryan, officer of the Killeen Police Department, Killeen, Texas



Marceline Lasater

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REFERENCE TO REPORTS OF RELEVANT OPINIONS IN THE CASE BY OTHER COURTS

August 15, 1985	Order by the District Court granting Ryan's Motion for Summary Judgment
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July 28, 1987	Order by the District Court granting Cooke's Motion for Summary Judgment
July 29, 1987	District Court Judgment
September 6, 1989	Opinion by the Fifth Circuit affirming and modifying judgments for Defendants
October 20, 1989	Per curiam opinion denying Petition for Rehearing and the Suggestion for Rehearing En Banc

JURISDICTIONAL GROUNDS

Judgment was entered on July 29, 1987, by the District Court.

The Fifth Circuit rendered its opinion, affirming and modifying the Judgment, on September 6, 1989, and on October 20, 1989, denied Petition for Rehearing.

Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254.

Jurisdiction was conferred on the District Court by 28 U.S.C. Sections 1331 and 1343.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment IV to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

Amendment XIV to the United States Constitution, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 9 of the Texas Constitution:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

42 U.S.C. Section 1983, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

FACTS

On September 1, 1982, a confidential informant, provided by Defendant McKenzie, a sergeant with the Temple Police Department, led Defendant Cooke, an undercover DPS officer, to a person now known to be Margaret Sowder a/k/a Angelina for a drug purchase. Sowder was generally described as short and light complected, and was on probation from December 1981 through December 1982 for drug activity, with weekly probation visits with her Bell County probation officer. The offense report was written up by Defendant Cooke and Margaret Sowder identified as "Margaret LNU." "LNU" is an abbreviation for "last name unknown." Another officer on the scene, Liz Bargas, simultaneously completed another offense report and identified the suspect as "Margaret Sowder a/k/a Angelina."

Bargas' report about the September 1, 1982, delivery was submitted to and approved by Defendant McKenzie who later identified the suspect as "Margaret Portz" to the Grand Jury, in spite of this prior knowledge of Sowder's identity.

Defendant Cooke was responsible for securing correct identification information regarding the suspect. Defendant McKenzie was also responsible for completing identification information on suspects in the planned county-wide drug bust, which was known as "Operation Eagle" and was very familiar with the details of the operation. Circumstantial evidence strongly indicates that Defendant McKenzie was the person who supplied the name Portz to the offense report (illustrated by a hand-written paper found in a work file in which Margaret was misspelled "Margratt," which

was a common misspelling for Defendant McKenzie).

On September 13, 1982, a DPS photograph of and other identification information on Margaret Sowder was requested and presumably obtained. On September 20, 1982 and again on October 15, 1982, a DPS photograph of and other identification information on Margaret Portz was requested and obtained by the Temple Police Department, for which Defendant McKenzie was a sergeant. This identification information put all parties on notice that Portz was not the name of the person who had delivered drugs to Defendant Cooke.

Other drug offenses involving Margaret Sowder had occurred and were reported on or about August 12 and August 19, 1982, which reports were submitted to and approved by the officer's superior, Defendant Ryan. Both

offenses involved the same addresses that were reported in the September 1 offense.

On September 10, 1982, proceedings were instituted to revoke the probation of Margaret Sowder, on the basis of her criminal activity of September 1 (in which Defendant Cooke was the only eyewitness). By September 13, 1982, she had been arrested, bonded out, and suspended from her job with the County.

Operation Eagle was an inter-agency cooperative effort to round up known drug offenders, using a confidential informant provided by Defendant McKenzie. Law enforcement from the county, the municipalities in the county, the District Attorney's office, and Department of Public Safety personnel worked together to put the cases together, including providing criminal histories and identification information together for the "bust out book," which

was ultimately to be used by the officers making the arrests eventually.

For some reason, the DPS rules were not followed with regard to Margaret Portz, and the only identification of Margaret LNU placed in the bust out book was her driver's license information, which completely contradicted the information in Cooke's offense report, which was the only other information used to indict Margaret Portz.

Defendants Cooke, McKenzie and Stewart knew that the offense reports formed the only basis for the indictments, and knew that the information in the offense reports would be relied on by the Grand Jury to indict. Defendant Cooke admitted that he had a duty to determine the correct last name for Margaret LNU when he wrote his offense report in early September 1982. He admitted that he personally made no

efforts to determine LNU's last name, and admitted that none of this would have happened if the identification had been done correctly.

Based on this information alone, it is clear that Defendants Cooke, McKenzie, Stewart and Ryan possessed ample evidence of the true identity of the person from whom drugs were purchased on September 1, 1982.

Nevertheless, Defendant Cooke admitted that he gave the name Portz to the district attorney's office, and circumstantial evidence indicates strongly that Defendant McKenzie was the person who supplied the name Portz to Defendant Cooke. The only connection between Margaret Sowder and Margaret Portz was the common first name and the place where they worked: Sowder was a janitor and Portz was a secretary. Sowder was short and light complected;

Portz was tall and dark complected. Sowder had a known criminal history with known and convicted associates; Portz was known to have an impeccable reputation, with no criminal associates.

Defendant Cooke never testified or swore out a probable cause affidavit regarding Margaret LNU's criminal activity. The case was presented to the grand jury by Defendant McKenzie, who simply read from a stack of offense reports prepared by various law enforcement officers. McKenzie admittedly had no personal knowledge of the allegations or the facts reported in the offense reports, and he did not present any testimony to the grand jury regarding the means by which identification of Margaret Portz was made. To this day, no one admits having knowledge of how the name Portz was obtained. The only evidence against

Portz presented to the grand jury was the offense report prepared by Defendant Cooke, with the name Portz supplied at some point prior to the typing of the capias.

Defendants Cooke, McKenzie and Stewart knew that none of the information used to connect Margaret Portz to the crime was reliable nor had it received the scrutiny of a neutral magistrate or grand jury.

On the evening of the bust out of all indicted persons in Operation Eagle, the capias showing the name Margaret Portz was given to Defendant Ryan by Defendant Cooke. Defendant Cooke orally told Ryan where to locate the suspect, giving one of Sowder's known addresses, which was also information independently possessed by Defendant Ryan because of his knowledge of her prior and lengthy criminal activity. Defendant Ryan argued

with Cooke, saying he knew where Margaret Portz lived, because she was his neighbor. The address was not one known by Cooke, and Portz' address was supplied by Defendant Ryan to the capias, along with Portz' date of birth. None of this new information supplying the particular description required by the Fourth Amendment and the Texas Constitution had received grand jury scrutiny. At the time, both Defendants Ryan and Cooke had access to the original offense report on Margaret LNU. A cursory review of that report would have indicated clearly that Margaret Portz was not the person to be arrested.

Defendant Stewart was at all relevant times responsible for the supervision of Defendant Cooke and for his activities in Operation Eagle. Defendant Cooke was required to and did deliver to Defendant Stewart all offense

reports regarding Operation Eagle. Defendant Stewart was responsible for insuring that all identification of all LNU's was complete before the indictment process and, independently, for departmental records. His supervisor testified that it was policy for Stewart to check "at least once a month" to insure that the LNU report was updated. Defendant Stewart admitted that he did nothing to update the LNU on this report. At no time did he otherwise require Defendant Cooke to completely identify Margaret LNU, and at no time did Cooke revise the offense report to reflect the suspect's last name. The supervisors admitted that the purpose of requiring follow-up was to insure that the wrong person was not arrested. The supervisors admitted that it was standard operating procedure for an officer to match the

physical description of a suspect where the last name was unknown.

Defendant Cooke admitted that it was standard operating procedure to obtain a driver's license photo on the suspect as soon as he had a last name. The evidence established that he had access to the name Portz as early as September 20 and again on October 15, but he never followed up on the discrepancy in the physical descriptions, but allowed the Portz driver's license information to be included in the bust out book, knowing that information would be used in the indictment and arrest processes.

At no time was there probable cause to support the indictment or arrest of Margaret Portz. At no time was any information as to the reliability of her identification documented or presented to the Grand Jury.

The name Portz was supplied only to the copy of the offense report that was read to the Grand Jury. Departmental rules and regulations required that this information be completed.

On November 16, 1982, the Assistant District Attorney noted that he needed "more ID" and on the offense report noted that he needed "all AKA" (an abbreviation for "all known aliases"). He discussed this problem with the law enforcement officers and was assured that Portz was the correct last name.

On November 17, 1982, the capias issued for the arrest of Margaret Portz (with no information particularly describing her, although it was known that her identification was questionable and had been questioned from the beginning), and Margaret Portz was arrested, strip-searched, and

incarcerated, released only after the payment of a bond.

STATEMENT OF THE CASE

Course of Legal Proceedings

The wrongful arrest and incarceration of Portz occurred on November 17 and 18, 1982. The indictment was dismissed on November 19, 1982.

Plaintiff's Complaint was filed in district court on June 28, 1984. R. 776-780. Jurisdiction was based on 28 U.S.C. Sections 1331 and 1343.

A Motion for Leave to Amend was filed on November 20, 1984, naming new defendants. R. 722-724. On December 4, 1984, the District Court ordered that Plaintiff's First Amended Complaint be filed. R. 710. On June 5, 1985, Plaintiff filed a second Motion for Leave to Amend, with Plaintiff's Second Amended Complaint attached. No Defendant ever filed an objection or response to it but the Court never ruled on it.

On August 15, 1985, the District Court granted Summary Judgment to Defendants Ryan and Stewart (and others not relevant herein). R. 173-175 and R. 169-170. On the same date, the District Court also granted Defendant McKenzie's Motion to Dismiss. R. 171-172. The allegations against Ryan were not reviewed in the Section 1983 context, although 1983 pleadings and evidence were before the Court. The claims against Stewart and McKenzie were dismissed on grounds that the statute of limitations had run before suit was filed. The Fifth Circuit specifically ruled that suit was timely filed as to them, and Portz does not seek further review of that ruling.

On July 29, 1987, the District Court granted Summary Judgment to Defendant Cooke on the grounds that the action taken by the Grand Jury insulated him

from liability. R. 13-19. Judgment was entered on July 29, 1987. R. 12.

Appeal was timely made to the Fifth Circuit Court of Appeals, which affirmed and modified the district court's Judgment on September 6, 1989. See Appendix, XXI through LV. A Petition for Rehearing and Suggestion for Rehearing En Banc was Filed, which was denied on October 20, 1989. See Appendix, LVI.

For purposes of focusing on seminal constitutional torts in this case, Portz does not request further review of the decisions as to Defendants Adams, Murray, Williams, McFarland, Eads, Clark, Bell County, Joines, Gunn, City of Temple, or Curtis, who were (variously) supervising DPS officers, prosecutors, jailers, and government employers.

ARGUMENT

The authorities in the Circuits conflict as to whether Defendants' conduct amounts to a Section 1983 claim. The predominance of authority, particularly from the Seventh circuit and some from the Fifth Circuit, indicates that Defendants' conduct is more than mere negligence and is actionable under Section 1983.

Portz offered as summary judgment evidence the facts outlined in the factual portion of the Statement of the Case, supra, which indicated that each Defendant was charged with knowledge of clearly established constitutional protections for the innocent, had ample information to lead him to believe that Portz was not the person to be indicted or arrested, and knew that it was predictable that his conduct would lead to the arrest and incarceration of the

wrong person, yet each Defendant knowingly and/or recklessly proceeded to use unreliable information to secure the indictment, arrest and/or incarceration of Plaintiff.

Anderson v. Creighton, 107 S.Ct. 3034 (1987) held that an officer's conduct must be viewed in light of clearly established law and the information he possessed at the relevant time, and that qualified immunity protects all but the "plainly incompetent" or those who knowingly violate the law. See also Malley v. Briggs, 106 S.Ct. 1092 (1986).

The numerous instances of dereliction of duty recited for each Defendant in the factual portion of the Statement of the Case constitutes incompetence and certainly more than "mere negligence." Each Defendant made more than one error on more than one

occasion each. Each Defendant went out of his way in failing to follow procedures or to acknowledge safeguards in the identification of the suspect.

For two and a half months, Defendants Cooke and Stewart wholly failed to perform their duties to insure that the DPS rules and regulations regarding identification of LNU's were complied with. Defendant Cooke played an active role in obtaining the unreliable information regarding the name of Portz. He had a wealth of information available to him to obtain the correct name of the suspect, none of which he attempted to use. Especially is his conduct inexcusable and actionable where another officer present at the scene of the drug delivery on September 1, 1982, correctly identified the suspect on her offense report and where the DPS identification

information was completely contradictory to the information in his report.

Defendants Cooke, Stewart and McKenzie also knew that the information presented to the Grand Jury regarding the identification of Margaret LNU was unreliable, yet McKenzie presented no information to the Grand Jury regarding the means of identifying Portz as the suspect, depriving them of the opportunity to make a meaningful decision as to the reliability of the identification. Rather than allowing the presentation to the Grand Jury and the subsequent indictment to be regarding "Margaret LNU" with a "particular description" as required by the Fourth Amendment and the Texas Constitution, Defendants Cooke, Stewart and McKenzie were instrumental in the suspect being presented and indicted as "Margaret

Portz," knowing that the information was unreliable.

At no point did any person comply with the well-established Fourth Amendment requirement that probable cause be supported by an oath based on personal knowledge. Neither McKenzie nor Cooke had any personal knowledge that Portz was the suspect, yet both were instrumental in delivering this information to the Grand Jury, without any cautionary advice that the identification was questionable.

The requirement of an oath or affirmation presupposes that the person making it has personal knowledge of the facts which are sworn to. This requirement is consistent with all principles of constitutional law which attempt to assure that the privacy of the innocent will not be interfered with unnecessarily and without due cause. Giordenello v. U.S., 357 U.S. 480 (1958);

Jones v. State, 568 S.W.2d 847 (Tex.Cr.Ap.1978), holding that the affidavit must have either the direct personal observations of the affiant or hearsay for which the affidavit shows the circumstances which show that the informant was reliable); Evans v. State, 530 S.W.2d 933 (Tex.Cr.Ap. 1975), which held that the complaint was invalid where there was no allegation that the affiant spoke with personal knowledge and therefore did not provide the necessary basis for establishing probable cause; and Gerstein v. Pugh, 420 U.S. 103 at 117-118 (1975).

Other Texas cases on criminal procedure established well before this incident that the Constitution requires that charges be based on the affidavit of a credible person having personal knowledge of the facts alleged. Colbert v. State, 314 S.W.2d 602, 166 Cr. R. 431

(Texas 1958); Ex parte Eldridge, 572 S.W.2d 716 (Texas 1978); Hollins v. State, 623 S.W.2d 651 (Texas 1981); Murphy v. State, 103 S.W.2d 765, 132 Cr.R. 202 (Texas 1937); Brown v. State, 294 S.W.2d 722, 163 Cr.R. 527 (Texas 1956); and Dupree v. State of Texas, 102 Tex.455, 119 S.W. 301 (1909).

Authorities indicate that under carefully guarded circumstances, hearsay from fellow officers involved in the same criminal investigation may be used to support probable cause testimony. U.S. v. Ventresca, 85 S.Ct. 741 (1965) and U.S. v. Hayles, 471 F.2d 788 (5th Cir. 1973). However, if hearsay is relied upon, the affiant must supply sufficient information to support an independent judgment that probable cause exists. Aguilar v. Texas, 378 U.S. 108 (1964); and Whiteley v. Warden, 401 U.S. 1031 (1971).

In Olson v. Tyler, 825 F.2d 1116 (7th Cir. 1987), the Seventh Circuit held that an officer is liable in a Section 1983 cause of action where the officer submitted a probable cause affidavit containing statements he should have known were false, had he not recklessly disregarded the truth, and where no accurate information sufficient to establish probable cause attended the false statements. The Court held specifically that the officer did not act in an objectively reasonable manner and that the Fourth Amendment requires the States to provide fair and reliable determinations of probable cause to support an arrest.

The Olson case is squarely on point with the Portz facts.

In Powe v. City of Chicago, 664 F.2d 639 (7th Cir. 1981), an arrest warrant was issued in one name despite officers'

knowledge that the real suspect used several aliases. The arrest warrant was used on four separate occasions to arrest the wrong person because the warrant did not comply with the Fourth Amendment's particularity requirement (in this case, to list the other aliases and/or a physical description). The Seventh Circuit held that where authorities had reason to suspect that the name they were using on the warrant was not the real name of the suspect, then some other description of the intended arrestee must be included in the warrant. The Court further held that inclusion of names that might be incorrect, combined with omission of specific description, creates a "substantial risk" that (1) an innocent person will be arrested and (2) a person as to whom there is no suspicion will be arrested. "This risk cannot be tolerated under the Fourth Amendment." Id. at 648.

In West v. Cabell, 14 U.S. 752 (1894), this Court held that, at common law, an arrest warrant must truly name the person or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable for false imprisonment. Although this case was not analyzed using Fourth Amendment principles, it clearly outlines the necessity for the requirement for a Fourth Amendment "particular description" where there is any question about the name.

In Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988), the Seventh Circuit held that where officers had plenty of indications that the person named was not the true suspect, they could not escape Section 1983 liability by pointing to acts of neutral magistrates whom they had defrauded.

The cases cited herein all indicate that Defendants Cooke, McKenzie, Stewart and Ryan will be held liable for their conduct in recklessly and repeatedly ignoring information which should have alerted them to the fact that Margaret Portz was not the person who committed the crime. These cases directly conflict with the Fifth Circuit's holding in this case that Defendants' acts constituted "mere negligence."

In the Fifth Circuit's own Brown v. Byer, 870 F.2d 975 (1989), it held a constable liable under Section 1983 where he deliberately altered an arrest warrant to include information never submitted to a neutral authority. THIS IS PRECISELY WHAT DEFENDANT RYAN DID IN THIS CASE; nevertheless, the Fifth Circuit refused to reverse as to Ryan.

In Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979), the Fifth Circuit held

that a sheriff was liable for obtaining search warrants when he knew his informants were not credible. The Court held that he had a duty to check for distortions and untruth. Similarly, Defendants Cooke, McKenzie and Stewart should be liable for their conduct in obtaining the indictment of Portz when they were charged with a wealth of information clearly indicating that Portz was not the name of the suspect.

In Baker v. McCollan, 99 S.Ct. 2689 (1979), there was no complaint about officers' conduct before the arrest; therefore, that case cannot be dispositive of the facts in this case in which there is vociferous complaint about pre-arrest conduct. Further, the complaint as to Defendant Ryan is not that he executed the warrant but that he unilaterally provided personal information that caused the arrest of

Margaret Portz, when he had been given other instructions and information which, if followed, would have led to either no arrest or the arrest of the correct person.

CONCLUSION

The Fifth Circuit affirmed the District Court's judgment for Defendants Cooke, McKenzie, Ryan and Stewart solely on its characterization of their conduct as mere negligence. AT NO POINT in these proceedings had any defendant contended that any defendant's conduct was "mere negligence" nor had the District Court so ruled. This contention had not been briefed in any forum in these proceedings, presumably because no party believed it to have merit.

The District Court in this case commented that

> There is something fundamentally unfair about a situation in which a woman is arrested, strip-searched, fired and otherwise humiliated, all due to the negligence or gross negligence of police officers, and she nonetheless has no redress for her injuries.

R. 18 The Court further remarked that its ruling against Portz was "distasteful," but that it felt bound by the precedent of Rodriguez v. Ritchie, 556 F.2d 1185, 1193 (5th Cir. en banc 1977), cert. denied, 434 U.S. 1047 (1978), which held that the grand jury determination broke the causal connection between the arrest and the officer's conduct.

The result in this case, unless reversed, is fundamentally unfair. A woman's life has been permanently and unnecessarily marred because of the incompetence and recklessness of at least four officers: Cooke, McKenzie, Ryan and Stewart.

In Franks v. Delaware, 98 S.Ct. 2674 (1978), this Court held that the constitutional requirement of "probable cause supported by oath" would be a nullity if police could use deliberately falsified allegations to show probable cause; therefore, a magistrate's finding of probable cause can be impeached and, in this case, evidence suppressed where the warrant issued based on "deliberate misstatements" or those of "reckless disregard."

The civil rights statute should be uniformly construed to allow recovery of damages where "deliberate misstatements" or statements made with "reckless disregard" of the truth occur.

Portz is asking this Court to make clear that "deliberate misstatements" or statements made in "reckless disregard of the truth" are MORE THAN MERE NEGLIGENCE AND ARE ACTIONABLE UNDER SECTION 1983.

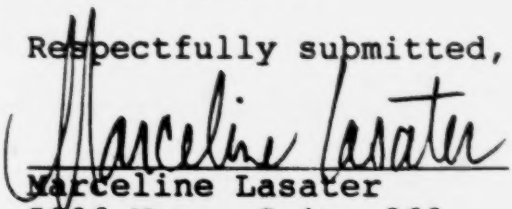
PRAYER

Plaintiff prays that the Court will read the facts outlined with great care, that the Court will perceive and rectify the fundamental unfairness of what happened to Margaret Portz at the hands of Defendants Cooke, Stewart, McKenzie and Ryan, and that the Court will review all Section 1983 precedents that appear to protect Defendants and disapprove those holdings to the extent that they affect this case.

Portz prays that this Court will reverse the District Court's Judgment and the portions of the Fifth Circuit's opinion complained of herein, and that it will affirm those portions of the Fifth Circuit's opinion modifying the District Court's Judgment and opinions, allowing Portz to proceed to trial on the merits against Defendants Cooke, McKenzie, Ryan and Stewart. Portz prays for any other

and further relief to which she may justly be entitled to receive.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF Texas

AUSTIN DIVISION

MARGARET PORTZ VALE	*	
	*	CIVIL NO.
VS.	*	A-84-CA-381
	*	
JAMES B. ADAMS, ET AL.		

ORDER

An unfortunate array of circumstances led to the arrest and imprisonment of Plaintiff, Margaret Portz Vale. No question exists that Ms. Portz Vale was not the person who had purchased some marijuana from an undercover police officer. No question exists that the Bell County Grand Jury handed down an indictment charging a "Margaret Portz" with delivery of the marijuana. [fn 1] The Court has reviewed a copy of that indictment and a capias for the arrest of Margaret Portz was issued pursuant to

this indictment. Larry Ryan, a Killeen Police Officer, arrested Ms. Portz pursuant to this capias. There is no question that the Bell County Grand Jury named the wrong person in the indictment. Thus the chain of events that led to this arrest was complete before Defendant Ryan executed the arrest. Officer Ryan was acting under authority of an indictment and capias from the Bell County Grand Jury.

The Court addresses Defendant Ryan's Motion for Summary Judgment. The Court is of the opinion that it is meritorious, and should be Granted. In this Circuit, a Grand Jury indictment established conclusively the existence of probable cause and provides lawful authority for a police officer's arrest. Rodriguez v. Ritchey, 556 F.2d 1185, 1191 (5th Cir. 1977), cert. denied, 434 U.S. 1047 (1978). The logic utilized in that case

is irrefutable--that if a warrant has been properly issued there cannot be a false arrest. Plaintiff has failed to establish that any act by Officer Ryan was unconstitutional; he executed an arrest pursuant to a legitimate warrant and capias. See also, Baker v. McCollan, 443 U.S. 137 (1979). It would seem irrational to this Court to establish a precedent that a police officer can be held liable for an act so clearly within the scope of his duties. Law enforcement agencies would be unable to fulfill their jobs if they were, by judicial fiat, to be held liable in a civil suit for the execution of a valid warrant of capias. Officer Ryan executed the arrest while on duty, and is entitled to a qualified immunity. Plaintiff has provided no evidence to this Court to overcome the presumption that Officer Ryan was acting in good faith.

The Court agrees with Defendant Ryan that no cause of action exists under a state law claim of false imprisonment. The elements of false imprisonment under Texas law are willful detention, absence of consent, and absence of legal authority. Moore's Inc. v. Garcia, 604 S.W.2d 261, 263 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.). Under Defendant's Motion, argument, and supporting exhibits, the arrest was made under the authority of law, i.e., the capias. See also James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982) and Sanchez v. Garza, 581 S.W.2d 258 (Tex.Civ.App.--Corpus Christi 1979, no writ). This Court is compelled to grant Summary Judgment for Defendant Larry Ryan.

IT IS SO ORDERED.

SIGNED and ENTERED this 15th day of August, 1985.

SIGNED BY JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

fn 1. Plaintiff has married since the date of the indictment and has changed her name to Margaret Portz Vale.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF Texas

AUSTIN DIVISION

MARGARET PORTZ VALE	*	
	*	CIVIL NO.
VS.	*	A-84-CA-381
	*	
JAMES B. ADAMS, ET AL.		

ORDER

Plaintiff brought suit against a host of Defendants in this case alleging that they violated her constitutional rights under color of state law by arresting, searching and jailing her wrongfully. In other words, she alleges a false arrest occurred. Without repeating the factual background set out in the pleadings of this Court, the Court now reviews the Motion of Arthur C. Eads, Lon Curtis, Clarence Edward Clark, Angie Joines, Lester Gunn, all in their official and individual capacities; and Bell County, Texas. The Court will also

consider Vernon McKenzie's and the City of Temple's Motion to Dismiss, as it is based on the same question of law.

There is no question that the appropriate statute of limitations in this case is two years, applying the most analogous state law, V.A.T.S. Art. 5526. See Williams v. Texas International Airlines, 435 F.Supp. 703, 706 (S.D.Tex. 1977). See also Adler v. Beverly Hills Hospital, 594 S.W.2d 153 (Tex.Civ.App. 1980, no writ). 42 U.S.C. Sections 1981, 1983, and 1985 do not contain their own statute of limitations. The statute of limitations is borrowed from the analogous state claim. Caldwell v. Martin Marietta Corp., 632 F.2d 1184 (5th Cir. 1980). The acts of which Plaintiff complains occurred no later than November 18, 1982. Plaintiff's original suit was filed on June 28, 1984. Plaintiff's first amended complaint was filed on

December 4, 1984. The Court has no choice but to Dismiss the suit against those persons. The Court will grant the Motion for Summary Judgment filed by Defendants Eads, Curtis, Clark, Joines, Gunn, and Bell County, Texas; and the Motions to Dismiss of Vernon McKenzie and the City of Temple.

IT IS SO ORDERED.

SIGNED and ENTERED this 15th day of August, 1985.

SIGNED BY JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF Texas

AUSTIN DIVISION

MARGARET PORTZ VALE	*	
	*	CIVIL NO.
VS.	*	A-84-CA-381
	*	
JAMES B. ADAMS, ET AL.		

ORDER

Came on for consideration this date the Motion of Defendants Jim Murray, Charlie Williams, W.C. McFarland and Richard Stewart to Dismiss this lawsuit against them. The Plaintiff's suit arises from an arrest that occurred on November 17, 1982, and her subsequent and immediate incarceration pursuant to that arrest. Plaintiff was released from custody on November 18, 1982. Although the Plaintiff filed her original suit on June 28, 1984, it was not until it was amended on December 4, 1984, that these Defendants were added. The Court decided that based on the facts of this case the

appropriate statute of limitation is two years. Art. 5526, Vernon's Ann. Civ. Stat. determines the period of limitations applicable to suits brought in Texas pursuant to 42 U.S.C. Section 1983. See Williams v. Texas International Airlines, 435 F.Supp. 703, 706 (S.D. Tex. 1977). That statute provides a two-year statute of limitations. Therefore the statute had run before Mssrs. Murray, Williams, McFarland and Stewart were brought into the case. The claims against them will be DISMISSED.

IT IS SO ORDERED.

SIGNED and ENTERED this 15th day of August, 1985.

SIGNED BY JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF Texas

AUSTIN DIVISION

MARGARET PORTZ VALE	*	
	*	CIVIL NO.
VS.	*	A-84-CA-381
	*	
JAMES B. ADAMS, ET AL.		

ORDER

Before the Court is the Motion for Summary Judgment of Defendants James B. Adams and James Cooke. The court, having considered the Motion, as well as the response of the Plaintiff, in addition to all of the pleadings on file in this cause, is of the opinion that the Motion is meritorious and should be Granted.

I. BACKGROUND

The facts are the stuff of which nightmares are made. This lawsuit is a perfect example of what follows from poor police work. On November 17, 1982 Margaret Portz (now Margaret Portz Vale) was awakened from her sleep, arrested by

a Killeen police officer and a DPS agent, taken to the Belton County Jail, strip-searched and jailed for the night. The arrest was part of a drug sweep, and thus was reported in the local media. Because Plaintiff was a probation department employee, her arrest drew particular attention. She was fired from her job on November 18, 1982. The reason these facts are nightmarish is because Margaret Portz was not the person sought by the authorities. Indeed, the only connection between Ms. Portz and the correct suspect was that they shared the same first name and worked for some period of time in the same building. Moreover, the correct suspect is described in police documents as a blond-haired, green-eyed female, approximately 4'11" tall, weighing 90 to 100 lbs. Margaret Portz is a 5'8" tall woman, dark-haired and weighs approximately 120 to 130 lbs.

The Plaintiff sued numerous Defendants, alleging various causes of action. The Court has earlier dismissed or granted summary judgment as to all but two of the Defendants. The remaining Defendants are Cooke and Adams. Cooke was an officer of the Texas Department of Public Safety, and was a member of the investigative effort which led to Plaintiff's arrest. Adams was the Director of the DPS, and was Cooke's ultimate supervisor. The Plaintiff has alleged that Cooke's sloppy investigative work led to the misidentification and eventual wrongful indictment of Plaintiff. She further alleges that Adams improperly trained and supervised Cooke, which led to Cooke's errors in the investigation. Both Defendants have moved for summary judgment, arguing that the indictment of Plaintiff by an independent grand jury broke the causal

chain between any acts on their part and the Plaintiff's injuries, and thus they are not liable for Plaintiff's injuries.

II. STANDARD OF REVIEW

A Court may only grant summary judgment if no genuine issues of material fact remain for trial, and movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); Celotex Corp v. Catrett, 106 S.Ct. 2548, 2552 (1986). In reviewing such a motion, a court must view the evidence in the light most favorable to the party opposing the motion, and indulge all reasonable inferences in favor of that party. Pharo v. Smith, 621 F.2d 656, 664 (5th Cir. 1980).

III. ANALYSIS

The Defendants do not, at this stage, contest the Plaintiff's allegations that their acts led to Plaintiff's injuries. They concede that

Plaintiff was not the person who sold narcotics to an undercover agent, and was not the person intended to be arrested on November 17, 1982. The Defendants argue that despite these facts they are entitled to judgment because the grand jury's return of an indictment against Plaintiff insulates them from liability.

Plaintiff's allegations in this case arise under 42 U.S.C. Section 1983 and under the common law of Texas. At various places in the Second Amended Complaint, Plaintiff characterizes her claims in differing manners:

> NOW COMES MARGARET PORTZ VALE, Plaintiff in the above-styled and numbered cause complaining of her false arrest, unreasonable search and seizure, and deprivation of liberty without due process of law . . . .

Second Amended Complaint at 1. In her jurisdictional statement Plaintiff states:

> This action is brought pursuant to 42 U.S.C. Section 1331 (1) (2) (3) and (4); U.S. Constitution Amendments 4, 5, and 14; 42 U.S.C. Section 1983; federal common law; Texas Constitution art. 1, Section 9; TEX.REV.CIV.STAT. ANN. arts. 6870, 6879b, TEX.CODE.CRIM.PRO. art. 21, and various other portions of the Texas Code of Criminal Procedures [sic]. Plaintiff further invokes the pendent jurisdiction of this Court to hear and decide claims arising under state law including false imprisonment, malicious prosecution, assault, invasion of privacy, intentional infliction of emotional distress, and actions against government officials acting outside the scope of their authority.

Id. at 2, Paragraph 1. Regardless of these characterizations, the only claim stated specifically against Defendant Cooke is that:

> DPS Investigator James Cooke failed to perform his duties by failing to accurately describe the woman who actually delivered marijuana to him and/or by failing to effectively communicate that information to the authorities who secured or prepared the indictment of the arrest

> warrant for Margaret Portz, who was indisputably innocent of the charges made.

Id. at 6-7, Paragraph 23. The only claim stated against Defendant Adams is that Defendant Cooke was "inadequately trained and/or supervised, for which failure . . . Defendant[ ] Adams . . . [is] liable to Plaintiff for causing her injuries." Id. at 8-9, paragraph 28.

The Fifth Circuit has had occasion to address false arrest or false imprisonment cases such as the instant case. In the en banc decision of Rodriguez v. Richey, the Circuit set down three guiding principles in this sort of case:

> First, and most basically, an arrest made under authority of a properly issued warrant is simply not a 'false' arrest, it is a 'true' or valid one. Second, if the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the causal chain and insulates

> an initiating party. Third, the general rule is that one who is engaged merely in investigatory work is not liable for a resulting false arrest, even if he acted maliciously.

Rodriguez, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047 (1978)(footnotes omitted). The second principle is directly applicable to this case. There is no dispute that the "facts" supporting Plaintiff's arrest were placed before a grand jury, which returned an indictment against Plaintiff. Thus, although the facts presented were inaccurate, the grand jury's action insulates Defendants as "initiating parties," from liability. Id. See also Jureczki v. City of Seabrook, Texas, 760 F.2d 666, 668-69 (5th Cir. 1985), cert. denied, 106 S.Ct. 1261 (1986). Indeed, the Circuit's later statements indicate that even if the Defendants had maliciously placed incorrect statements

before the grand jury, the second principle of Rodriguez would insulate them. Smith v. Gonzales, 670 F.2d 522, 526 (5th Cir.), cert. denied, 459 U.S. 1005 (1982); accord, Wheeler v. Cosden Oil and Chemical Co., 744 F.2d 1131, 1132 (5th Cir. 1984) (on petition for rehearing).

A corollary to the second principle of Rodriguez is that claims sounding in malicious prosecution are not governed by the break in causation rule. Wheeler, 744 F.2d at 1132-33. The Wheeler corollary does not have an application to this case, however. Despite Plaintiff's broad allegations in the jurisdictional statement of her Second Amended Complaint, it is clear that she has stated no malicious prosecution claim against these Defendants. No allegations of malice are made as to these Defendants; rather all the allegations

concerning them are in the nature of negligence allegations, much like the allegations in Rodriguez. See Rodriguez, 556 F.2d at 1193. A claim that officers negligently allowed an indictment to issue is insufficient to state a cause of action in these circumstances. Id. See also Von Williams v. City of Bridge City, Texas, 588 F.Supp. 1187, 1190 (E.D. Tex. 1984), aff'd mem., 760 F.2d 267 (5th Cir. 1985). the Court must therefore grant the Defendants' Motion.

The Court notes that it does not necessarily agree with the rule of Rodriguez. As Justice White stated in his dissent to the denial of certiorari in Smith, the law in this area is muddled, and the rule of the Fifth Circuit is in conflict with other circuits. Smith, 459 U.S. 1005, 1006 (White, J. dissenting from denial of petition for writ of certiorari). There

is something fundamentally unfair about a situation in which a woman is arrested, strip-searched, fired and otherwise humiliated, all due to the negligence or gross negligence of police officers, and she nonetheless has no redress for her injuries. The purported rationale for this rule is that an independent third party (the grand jury) reviewed all the facts, and "broke the causal chain." The fact of the matter, however, is that the grand jury never was given any reason to doubt the veracity of the officers' incorrect identification of Plaintiff as a criminal. Nevertheless, the Court is bound to apply the precedents of this Circuit, no matter how distasteful, and it will do so.

ACCORDINGLY, IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED, and the claims against Defendants Cooke and Adams are DISMISSED.

SIGNED and ENTERED this 28th day of July, 1987.

SIGNED BY JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-1664

MARGARET PORTZ VALE, Plaintiff-Appellant

v.

JAMES B. ADAMS, JAMES COOKE, VERNON McKENZIE, JIM MURRAY, CHARLIE WILLIAMS, RICHARD STEWART, W.C. McFARLAND, ARTHUR C. EADS, CLARENCE EDWARD CLARK, BELL COUNTY, ANGIE JOINES, LESTER GUNN, LARRY RYAN, CITY OF TEMPLE, AND LON CURTIS, EACH IN VARIOUS CAPACITIES, Defendants-Appellees

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Appeal from the United States District Court for the Western District of Louisiana [sic]

(A-84-CA-381)

(September 6, 1989)

Before GARZA, JOLLY and JONES, Circuit Judges.* [*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

EDITH H. JONES, Circuit Judge:

Margaret Portz Vale was arrested by mistake on November 17, 1982 and was released the next day. She then sued fifteen defendants under 42 U.S.C. Section 1983 (1982) and pendent state law theories, but she joined twelve of these fifteen defendants by an amendment filed in district court November 20, 1984 and not approved for filing until December 4, 1984, two years and seventeen days after the alleged tort. The district court granted the summary judgment motions of ten defendants and granted the motion to dismiss filed by two others, all based on statute of limitations grounds. The court granted the original three defendants summary judgment on the merits. We affirm the judgments, with some variation in reasoning from that used by the district court.

I.

On November 17, 1982, Margaret Portz (Vale) [fn.1] was arrested by Killeen, Texas police officer Lanny Ryan, after having been named in a drug indictment returned earlier in the day. Portz was indicted along with 79 others in connection with "Operation Eagle," an elaborate, lengthy undercover drug operation designed to weed out drug trafficking in Bell County, Texas. To obtain the indictments, City of Temple police officer Vernon McKenzie read from a stack of offense reports prepared during the investigation by various law enforcement personnel, including Department of Public Safety ("DPS") Agent James Cooke, who was working undercover. Even though Cooke's offense reports on Margaret Portz referred to her as "Margaret LNU" ("LNU" a short-hand form of "last name unknown"), the last name of

"Portz" was placed in DPS records and eventually supplied to the Bell County district attorney's office for purposes of presenting the case to the grand jury. Following her arrest, Portz was strip-searched and incarcerated overnight.

It is undisputed that Portz was not connected with drug trafficking in Bell County and that the use of the last name "Portz" to identify "Margaret LNU" was erroneous. On June 28, 1984, Portz filed suit under 42 U.S.C. Section 1983 and state law against Officers Ryan and Cooke and against DPS Director James Adams. On November 20, 1984, Portz filed a motion for leave to amend her complaint to assert causes of action against twelve additional defendants. [fn.2] The motion was granted on December 4, 1984, and the amended complaint was accordingly filed on that date.

On August 15, 1985, the district court granted motions by DPS defendants Murray, Williams, McFarland, and Stewart, Bell County defendants Eads, Curtis, Clark, Joines, Gunn, and Bell County's motions for summary judgment, and the City of Temple and McKenzie's motion to dismiss, all based on the statute of limitations. The district court also granted summary judgment in favor of Ryan on the merits. On July 28, 1987, the district court granted summary judgment in favor of Cooke and Adams on the merits. This appeal followed.

II.

We evaluate the district court's decision to grant summary judgment by examining the record under the same standards as those used by the district court. Brooks, Tarlton, Gilbert, Douglas & Kessler v. United States Fire Ins. Co., 832 F.2d 1358, 1364 (5th Cir. 1987); Reid

v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). Therefore, a summary judgment can only be affirmed if "we are convinced, after an independent review of the record, that 'there is no genuine issue as to any material fact' and that the movant is 'entitled to a judgment as a matter of law.'" Brooks, 832 F.2d at 1364 (quoting Fed.R.Civ.P. 56(c)). Under this standard, we consider fact questions with deference to the nonmovant. When a fact issue controls the disposition of a summary judgment motion, we will "review the facts drawing all inferences most favorable to the party opposing the motion." Reid, 784 F.2d at 578. However, we decide questions of law just as we decide questions of law outside the summary judgment context, by de novo review. Brooks, 832 F.2d at 1364.

In Celotex Corp. v. Catrett, the Supreme Court discussed the standard to be used in deciding to grant summary judgment:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In the instant case, then, Margaret Portz must make a sufficient showing on the essential

elements of her case, as to which she bears the burden of proof, to avoid summary judgment in the movants' favor.

III.

Defendants Ryan, Adams, and Cooke were awarded summary judgment based on the lack of substantive merit to Portz's claims. The district court found that Adams, director of DPS, had no knowledge or participation in the investigation. The court found that Officer Cooke was insulated from liability pursuant to Rodriguez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047 (1978). The court held Officer Ryan to be immune because he merely executed an arrest pursuant to a facially valid warrant.

Portz argues that the district court erred in granting summary judgment in favor of defendants Cooke and Adams based on its determination that the grand

jury's decision to indict insulated them from liability for recklessly identifying the wrong person. Officer Cooke was involved in the investigation of the drug ring that led to the overall bust. Cooke was an undercover agent whose deposition testimony established that in his undercover capacity he purchased drugs from "Margaret LNU" and prepared an offense report accordingly. At some time during the undercover operation "Margaret LNU" was identified, erroneously, as Margaret Portz. Adams, as Chairman of the DPS, was in the chain of command above the agents who actually investigated this case. However, there is no evidence that Adams had any direct connection to the mistakes which led to Margaret Portz's arrest.

In dismissing Portz's claim against Cooke and Adams, the district court relied on the Fifth Circuit's

determination in Rodriguez v. Ritchey, 556 F.2d 1185. In Rodriguez this court reversed a panel decision that a jury issue had been created when an FBI agent misidentified an illegal gambling operations suspect known only as "Margo" as the plaintiff Margo Rodriguez. We stated:

> It is true that the fourth amendment does command that probable cause support a warrant. However, just because a person validly arrested is later discovered to be innocent does not make the arrest "unlawful" for fourth amendment purposes. To the contrary, it has long been settled that an indictment by a properly constituted grand jury conclusively determines the existence of probable cause and provides the authority for an arrest warrant to issue.

Id. at 1190-91. See also Simons v. Clemons, 752 F.2d 1053 (5th Cir. 1985); Jureczki v. City of Seabrook, Tex., 760 F.2d 666 (5th Cir. 1985).

Following these cases, the Supreme Court held that a subfacial challenge to an arrest warrant may state a constitutional claim. Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). The extent to which Malley may affect these cases has not been decided in our circuit, nor need we do so here. Compare Brown v. Byer, 870 F.2d 975, 979 (5th Cir. 1989). We can affirm the district court's judgment for Adams and Cooke on alternate grounds. Adams's only alleged connection to the arrest is based on inadequate training and supervision of Cooke; there is no claim that Adams was personally involved in the operation Eagle investigation. As to Cooke, Portz alleges:

> DPS Investigator James Cooke failed to perform his duties by failing to accurately describe the woman who actually delivered marijuana to him and/or by failing to effectively communicate that

> information to the authorities who secured or prepared the indictment of and arrest warrant for Margaret Portz. who was indisputably innocent of the charges made.

The essence of the claims against both Adams and Cooke, then, is negligence. In a very similar case, we recently held that negligent conduct which led to the arrest of an innocent man, because the first name in the indictment inexplicably became "Gerardo" rather than "Gerald," did not subject the investigating officers to Section 1983 liability. Herrera v. Millsap, 862 F.2d 1157 (5th Cir. 1989). Our ruling was predicated on Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and Davidson v. Cannon, 474 U.S. 344, 347-48, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986), which held that no due process violation occurs from a negligent act of an official that causes unintended

injury. See also Simmons v. McElveen, 846 F.2d 337 (5th Cir. 1988) (summary judgment on a section 1983 claim granted in favor of defendants although plaintiff was incarcerated for 8 months because of their negligent errors).

Nor can Portz rely on our recent decision in Brown v. Byer, 870 F.2d 975 (5th Cir. 1989). This court found in Brown that an arrest violated the arrestee's fourth amendment rights in a situation where the constable changed the name on the arrest warrant, changed information including the suspect's driver's license number and address to match those of the arrestee, and added information that described the appearance and birth date of the arrestee. The person who altered the warrant was found by a jury to be liable; the jury apparently disbelieved the alterer "since they found that his alterations to the

warrant were unreasonable, shocking to the conscience, and in callous disregard of Brown's [the arrestee's] constitutional rights." Id. at 978. The deliberate alteration of the arrest warrant to include information never submitted to a neutral authority critically distinguishes Brown from this case.

The third of the original defendants sued by Portz is Officer Lanny Ryan. Portz asserts that the district court erred in granting summary judgment in favor of defendant Ryan on the basis that he arrested her pursuant to a facially valid warrant. Ryan, a Killeen, Texas police officer, was not directly connected with "Operation Eagle." On the evening of November 17, 1982, after the Bell County grand jury returned indictments against 79 persons and capiases for their arrest were issued,

the capiases were distributed to various law enforcement teams for execution. Ryan was given the Margaret Portz capias and he arrested her. The district court granted summary judgment in favor of Ryan on both the section 1983 claim and Texas law.

Generally, an arrest pursuant to a facially valid warrant does not violate the fourth amendment because the warrant is based on a probable cause determination. Simons v. Clemons, 752 F.2d at 1055 (citing Baker v. McCollan, 443 U.S. 137 (1979)). Moreover, as Ryan asserts, Baker stands for the proposition that an arrest pursuant to a facially valid warrant does not deprive anyone of a right secured by the constitution. Since Ryan was not implicated in procurement of the warrant, the district court was correct in granting summary judgment on the section 1983 claim.

The district court also determined that a false imprisonment claim under Texas law was unavailable against Ryan. In Sanchez v. Garza, 581 S.W.2d 258, 259 (Tex.Civ.App.--Corpus Christi 1979, no writ), the court held that it is a "complete defense to an action for false arrest or imprisonment that the arrest or detention was executed by virtue of a process legally sufficient in form and duly issued." It is not an arresting officer's responsibility to determine whether the arrest warrant he is executing is wrongfully issued. Id. at 260.

In the instant case, Officer Ryan is charged with apprehending Margaret Portz at her residence even though the indictment listed Margaret Sowder's address for her. Ryan said he knew Margaret Portz's actual address because she was his neighbor. In essence, all

Ryan did was arrest the named defendant. This officer cannot be subjected to liability for money damages merely because he arrested, in good faith, the person named in the indictment., Even if he should have been alerted by the discrepancy between Margaret Portz's name and the address given for her that the indictment was faulty, his error was at most negligent. See Simmons v. McElveen, 846 F.2d 337 (5th Cir. 1988).

IV.

Portz asserts that the district court erred in dismissing her claims against defendants Williams, Stewart, McFarland, Murray, McKenzie, City of Temple, Clark, Curtis, Eads, Gunn, Joines, and Bell County based on the statute of limitation without considering the Texas tolling provision or the federal relation-back doctrine. Portz sought leave to file her first amended

complaint on November 20, 1984, alleging damages for her November 17-18, 1982 false arrest and imprisonment against twelve additional defendants. Because the proper statute of limitations for section 1983 actions is the general state tort law provision, the applicable limitation period is two years. Tex.Rev.Civ.Stat.Ann. art. 5526 (now Tex.Civ.Prac.& Rem.Code Ann. Section 16.003 (Vernon 1986)). Owens v. Okura, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989).

Although more than two years had passed as to all twelve of the added defendants, the Texas tolling provision, Tex.Rev.Civ.Stat.Ann. art. 5539 (now Tex.Civ.Prac.& Rem.Code Ann. section 16.063 (Vernon 1986)) provides as follows:

> The absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of

> limitations for the period of the person's absence.

Portz invoked the Texas tolling statute in response to defendants' motions for summary judgment in the following amounts: McKenzie--3 days; Stewart--2 days; McFarland--14 days; Eads--25 days; Clark--5 days; Joines--28 days. [fn.3] She further asserts that the date she filed her motion for leave to file amended complaint naming these defendants and others (i.e., November 20, 1984) should be used as the date for determining whether the amended complaint was timely, and not the date the amended petition was actually filed (i.e., December 4, 1984). The defendants vigorously contest use of the earlier date.

In Canion v. Randall & Blake, 817 F.2d 1188, 1192 (5th Cir. 1987), this court determined in virtually identical

circumstances that the date of filing a motion to intervene, and not the later date of approval of the motion and actual filing, determines the commencement of an action for purposes of the statute of limitations. Under the rationale of Canion, Portz's petition was timely filed within the tolling statute as to McKenzie, Stewart, McFarland, Eads, Clark, and Joines.

As to the remaining defendants -- Curtis, Gunn, Bell County, the City of Temple [fn.4], Murray, and Williams -- Portz asserts that they were properly added in accordance with Fed.R.Civ.P. 15(c). Rule 15(c) provides:

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleadings. An amendment changing the party

> against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Portz's amended complaint does not meet the statutory criteria because there is nothing in the record to indicate that she was mistaken as to the identity of the proper parties. In Cooke's September 21, 1984 deposition, he discusses Williams, Stewart, Curtis, and Murray, Cooke depo. at 9, 15, 17, 32-33, and 82, as well as the method by which the grand jury indictment of Portz was obtained. Id. at 33, 57-58. In Clark's October 2, 1984 deposition, he also testified as to

the method by which indictments are obtained in Bell County. See Clark depo. at 26-28. Although Gunn and Joines were not named in either of these depositions, because Gunn was the sheriff of the jail where Portz was detained, and Joines performed the strip search, Portz was aware of their roles and could easily have ascertained their names, if not known, in a timely manner. The district court did not err in dismissing the claims against these defendants based on the statute of limitations.

This court also upholds the dismissal of the remaining six last-added defendants (McKenzie, Stewart, McFarland, Eads, Clark, and Joines) on the basis of their immunity or substantive defenses.

A. Two of these defendants, Eads and Clark, are entitled to absolute prosecutorial immunity because they acted only in their capacities as prosecutors

and there is no evidence that they exceeded the bounds of their authority. The roles of Eads and Clark, along with Curtis, in "Operation Eagle" were limited to screening the cases to determine the legal sufficiency of the evidence and then presenting the cases to the grand jury, activities that are strictly prosecutorial in nature. They were not involved in the investigation of the case against Portz and relied upon the offense reports of the investigating agencies.

The United States Supreme Court has made it clear that prosecutors acting within the scope of their official capacities are entitled to absolute immunity from liability for alleged civil rights violations. Imbler v. Pachtman, 424 U.S. 409, 427, 96 S.Ct. 984, 993, 47 L.Ed.2d 128 (1976). The policy and purpose behind such a rule is clear: to allow a prosecutor to be subjected to

potential liability for decisions made in the exercise of his duties would prevent the vigorous and fearless performance of his job, which is essential to the proper functioning of the civil justice system. Imbler, 96 S.Ct. at 993-94. To permit prosecutors to be made subject to suits by those who are not convicted would open the door for unlimited harassment and embarrassment of the most conscientious officials. Imbler, 96 S.Ct. at 991-92.

This court has held that prosecutorial immunity extends to activity in initiating, investigating, and pursuing criminal prosecution. Cook v. Houston Post, 616 F.2d 791, 793 (5th Cir. 1980). Screening the cases to be presented to the grand jury is an integral part of the function of a prosecutor. As long as a prosecutor is acting within the scope of his duties, or is authorized by law to do the activities

complained of, he is immune. A prosecutor cannot be held liable for his activity in presenting evidence to a grand jury. Slavin v. Curry, 574 F.2d 1256, 1264 (5th Cir.), modified on other grounds, 583 F.2d 779 (1978), overruled on other grounds, Sparks v. Duval County Ranch Co., 604 F.2d 976, 978 (5th Cir. 1979). Likewise, he is immune for his action in seeking an indictment and in presenting evidence against a defendant. Bruce v. Wade, 537 F.2d 850, 852 (5th Cir. 1976). The immunity for grand jury activity applies even when the evidence is presented maliciously, wantonly, or negligently. Morrison v. City of Baton Rouge, 761 F.2d 242, 248 (5th Cir. 1985). Other Fifth Circuit cases support the application of absolute immunity here. See Tarter v. Hury, 646 F.2d 1010 (5th Cir. 1981); Connor v. Pickett, 552 F.2d 585 (5th Cir. 1977). When the immunity

of a party is clearly established as it is in this case, that party is entitled to summary judgment in his favor. Bryant v. Commonwealth of Kentucky, 490 F.2d 1273 (6th Cir. 1974).

B. Defendants Joines and Gunn were entitled to summary judgment because the record establishes that their actions were not unconstitutional. Joines was a correctional officer in the Bell County Jail during the relevant periods in this case, and Gunn, now deceased, was county sheriff.

In this case, Portz is alleging that the policy of strip-searching prisoners was unconstitutional, and that there was no basis for even accepting her as a prisoner in the jail. As for the policy of strip-searching, the Supreme Court held in 1979 that visual strip searches of prisoners after contact with persons from outside the facility was reasonable

and constitutional, and could be conducted without probable cause. Bell v. Wolfish, 441 U.S. 520, 558-60, 99 S.Ct. 1861, 1884-85, 60 L.Ed.2d 447 (1979). Furthermore, it has been specifically held that a strip search is not improper when a suspect is going to be placed in the general jail population and has been charged with a drug offense. Watt v. City of Richardson Police Dept., 849 F.2d 195, 197 (5th Cir. 1988). Lusby v. T.G.&Y. Stores, Inc., 749 F.2d 1423, 1434 (10th Cir. 1984), vacated on other grounds, 474 U.S. 805, 106 S.Ct. 40, 88 L.Ed.2d 22 (1985). Sheriff Gunn of Bell County testified that he was aware of the constitutional law in the area of searches, knew that searches were to be reasonable, and did not think his policy was illegal. The searches were conducted as a part of his jail policy for the purpose of preventing the introduction of

drugs or weapons into the jail population. He instructed his subordinates not to touch the prisoners, and the search was purely visual.

Joines was aware of the search policy of her superior and followed it, conducting only a visual search of Portz. Portz was brought to the jail with a capias showing she was charged with possession of marijuana, and Joines knew that there had been a drug bust. According to the testimony, she felt that she had a duty to receive the prisoner and search her according to jail policy. Portz admits that there was no bodily contact, and that Joines did not mistreat her in any way. No evidence of bad faith, either objective or subjective, is shown in the record on the part of either Gunn or Joines.

In this case, Joines had a legal duty to accept Portz as a prisoner when

she was presented with the capias charging Portz with a drug-related offense. She had a duty to supervise and insure safety in the jail, and discharged that duty by conducting a visual strip search for drugs or weapons, pursuant to a policy that had been upheld by the United States Supreme Court in other correctional institutions. She clearly maintained the proper balance between respect for the privacy of the prisoner and maintaining order and safety in the jail. See Bell, 99 S.Ct. at 1885. Her actions entailed no fourth amendment violation.

C. The claim Portz brings against defendants Stewart and McFarland is based on the ground that these two defendants were in the chain of command above the agents who actually investigated this case. DPS agents Williams and Cooke were involved in the investigation of the drug

ring that led to the overall bust. Cooke was an undercover agent whose report said that he purchased or sold drugs to Margaret "LNU." At the time of the incident in question, investigating officer Cooke reported to DPS Director James Adams through an extensive chain of command -- James Cooke to Richard Stewart to Jim Murray to W.C. McFarland to James Adams. Portz sued not only James Cooke and James Adams, but all the supervisors in between. The offense report was prepared by Cooke, who then provided a copy to his supervisors, defendants Stewart and Murray, who reviewed the report. A copy was also provided to defendant McFarland, who did not read the report. Defendant Adams apparently had no connection with this case. Although these various supervisors were in the chain of command above the investigating officers, the evidence shows that they

had no direct connection to the mistakes which led to Portz's arrest. Thus, there is no evidence of any conduct on their part that constitutes a constitutional tort. See Baker v. McCollan, 443 U.S. at 146, 99 S.Ct. at 2693.

The doctrine of respondeat superior is insufficient to establish liability under section 1983. Baskin v. Parker, 602 F.2d 1205, 1208 (5th Cir. 1979). Accordingly, the supervisory defendants cannot be held liable for the tortious action, if any, of James Cooke. To establish liability, the plaintiff must show either that the supervisors were personally involved in the acts causing the deprivation, or that there is a causal connection between an act of the supervisor and the constitutional violation sought to be redressed. Douthit v. Jones, 641 F.2d 345, 346 (5th Cir. 1981).

Here, it is undisputed that none of the DPS defendants personally participated in the arrest of the plaintiff nor did any of the DPS defendants present this case to the grand jury. Instead, the plaintiff seeks to establish a causal connection between the supervisory defendants and the alleged constitutional deprivation by means of a report. The evidence shows that defendant Cooke prepared a written offense report; a copy of the offense report was read by defendants Stewart and Murray; an additional copy of the report was sent to the office of defendant McFarland, but he did not see the report. Defendant Adams had no personal knowledge of the report, nor was a copy provided to him.

None of the supervisory defendants had the involvement or participation necessary to meet the above standard.

Nor can any causal factor be shown to exist. Therefore, summary judgment was appropriate.

D. The final defendant to whom summary judgment was properly granted in Sergeant Vernon McKenzie. According to the plaintiff, when the undercover agents wrote up their reports about Margaret "LNU," at least some of these reports were submitted to Sergeant McKenzie. Defendant Mckenzie also later testified to the grand jury concerning the information he had received from the agents about Margaret Portz.

Portz argues that Sergeant McKenzie was deliberately indifferent to her rights because he testified before the grand jury concerning the indictable offense by Margaret Portz, even thought he did not have personal knowledge of what occurred. Portz agrees that McKenzie could testify on less than

personal knowledge, but she contends that he should have had reliable hearsay information.

Portz's claims about McKenzie lack any specificity as to any deliberate mistake on his part. There is no evidence that McKenzie's actions constituted anything more than negligence, if even that. As discussed earlier, the Supreme Court held in Daniels v. Williams that negligent deprivations of liberty or property do not implicate the Due Process Clause. 106 S.Ct. 662, 666 (1986). See also Davidson v. Cannon, 474 U.S. at 347-48, 106 S.Ct. at 670, 88 L.Ed.2d at 677; Herrera v. Millsap, 862 F.2d at 1160. We therefore agree that summary judgment in favor of McKenzie was appropriate.

V.

Two final matters must be briefly considered. Portz contends that the

district court abused its discretion in assessing attorney's fees against her counsel for seeking sanctions against defendant McKenzie in January 1987 for his failure to attend a deposition in early 1985. He was deposed February 21, 1985. McKenzie was dismissed from the suit August 15, 1985. Thus, at the time plaintiff's counsel sought sanctions against McKenzie, his deposition had occurred almost twenty-four months previously, and McKenzie had been dismissed from the suit more than sixteen months previously. The court clearly did not abuse its discretion and this assertion is meritless.

Second, Portz asks us to clarify the district court's treatment of her pendent state causes of action. We read the court's judgment as dismissing <u>all</u> her claims against the twelve defendants joined in November, 1984, because of a

limitations bar. We have held, however, that the action against only 6 of those parties unequivocally fell within that bar, and we refused to address the effect of Texas' tolling statute on the other six. Part IV, supra. We therefore affirm the dismissal of the pendent state claims against Curtis, Gunn, Bell County, City of Temple, Murray and Williams based on the statute of limitations. Dismissal of state law claims against the other appellees is affirmed as a matter of judicial discretion, without prejudice to Portz's rights in state court.

For the foregoing reasons, we accordingly AFFIRM the district court's judgments against plaintiff Portz, and MODIFY the judgments against Cooke, McKenzie, Stewart, McFarland, Eads, Clark & Joines to be without prejudice.

FOOTNOTES

fn. 1: At the time of the indictment and arrest, plaintiff's last name was Portz. She married prior to filing suit and her surname is now Vale. However her maiden name is used throughout this opinion.

fn. 2: The additional defendants are: DPS officers Jim Murray, Charlie Williams, Richard Stewart, and W.C. McFarland; Bell County District Attorney Arthur Eads, Assistant District Attorneys Lon Curtis and Clarence Edward Clark, Sheriff Lester Gunn, Deputy Sheriff Angie Joines, and Bell County itself; and City of Temple police officer Vernon McKenzie and the City of Temple.

fn. 3: We shall assume without deciding that the tolling provision applies to Portz's claims against these defendants and that the amended complaint may be timely as to them. It then becomes unnecessary to address defendants'

arguments that the purposes of the tolling statute are not served by its application to them, particularly insofar as they are sued in their official capacity.

fn. 4: At one point Portz argues that the timely filing of suit against McKenzie, from Temple, and the defendants from Bell County, in their official capacities, automatically renders the suit timely against their public employers. We disagree. Our court has held that a public employer must be joined by name in a section 1983 suit as a prerequisite to imposing liability on a governmental entity. Hart v. Walker, 720 F.2d 1443, 1445 (5th Cir. 1983). It seems inconsistent to require specific joinder of the governmental entity and yet to hold, as Portz urges, that rule 15(c) permits relation back of a late-filed pleading joining the entity. In

any event, the City of Temple and Bell County cannot be liable for the actions of their employees whom we elsewhere exonerate on the merits.